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Supreme Court, U.S.
FILED
NOV 12 1996
CLERK

No. 95-8736

In The

Supreme Court of the United States

October Term, 1996

LARRY OSA OGBOMON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

Counsel:

ROBERT E. JUCEAM, ESQ.
DOUGLAS W. BARUCH, ESQ.
CAROL L. WOLCHOK, ESQ.

Counsel of Record:

N. LEE COOPER, ESQ.
President
American Bar Association
750 North Lake Shore Drive
Chicago, Illinois 60611

312/988-5000

Attorneys for Amicus Curiae

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STATEMENT OF INTEREST

The American Bar Association ("ABA") is a voluntary national membership organization of the legal profession, with over 390,000 members representing every state and territory and the District of Columbia.[1] The ABA's membership includes prosecutors, public defenders, attorneys in private practice, trial and appellate judges at the state and federal levels, legislators, law professors, law enforcement and corrections personnel, law students, and non-lawyer "associates" in allied fields.

The ABA has an historic interest in questions concerning the administrative and judicial review of claims by aliens seeking fair enforcement and implementation of our nation's immigration laws. One long-standing policy of the ABA is to ensure adequate due process safeguards in proceedings regarding the application of immigration laws. Consistent with this interest, the ABA's policymaking House of Delegates created the Coordinating Committee on Immigration Law in 1983. This committee, made up of representatives of nine ABA entities with immigration law expertise, has sponsored immigration law seminars and training programs, assisted organizing numerous pro bono immigration representation efforts and educated volunteer attorneys from the private bar to

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[1] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial or individual member of the American Bar Association. No inference should be drawn that any member of the Judicial Division has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

counsel aliens regarding the applicability of United States immigration laws.

The ABA also has an active and direct interest in the efficient and equitable administration of justice for aliens, including the right to due process protections in exclusion, deportation and asylum proceedings as well as securing the right to counsel in immigration proceedings generally. The ABA has previously submitted briefs as *amicus curiae* in several matters concerning the rights of aliens, including *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991), and *Ardestani v. INS*, 502 U.S. 129 (1991).

The ABA appears as *amicus curiae* in the case at bar because the question presented raises serious issues regarding the due process rights of defendants facing possible deportation orders by federal district judges at the time of criminal sentencing. As discussed herein, the practice upheld by the Eleventh Circuit of sentencing defendants to deportation as a condition of supervised release, without adequate notice or opportunity to contest deportability or apply for relief, improperly deprives defendants of their constitutional due process rights.

Counsel for the Petitioner and the United States have consented to the participation of the ABA as *amicus curiae* in this matter.

SUMMARY OF ARGUMENT

This Court and the lower federal courts consistently have articulated and demanded that deportability determinations, which implicate protected liberty interests, must adhere to due process standards. Over the years, this Court in particular has played a significant and critical role in assuring that aliens within the United States who are facing possible deportation are accorded basic due process protections and that administrative deportation proceedings comply with due process requirements.

The case at bar raises due process considerations for a particular class of defendants: those who are aliens or who are suspected of being aliens and who have been convicted of a criminal offense and are awaiting sentencing by a federal district court judge. In this case, the district court, as part of the criminal sentence imposed, ordered the Petitioner to be deported from the United States upon the completion of his term of imprisonment, as a condition of supervised release. The district court imposed this portion of the sentence, over Petitioner's objection, pursuant to a criminal statute, 18 U.S.C. § 3583(d), which provides in relevant part:

> If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

Id. The Eleventh Circuit Court of Appeals affirmed the sentencing order after construing section 3583(d) as authorizing federal district judges to impose deportation orders on alien defendants at sentencing.

Due process of law, however, requires that any person in the United States facing potential deportation – including an alien defendant awaiting criminal sentencing – be afforded basic constitutional protections. For example, (a) the defendant must receive adequate notice of the deportability charges, (b) the defendant's alienage and deportability must first be established by clear, unequivocal and convincing evidence, (c) the defendant must be afforded a meaningful opportunity to contest alienage and deportability allegations, and (d) once alienage and deportability are established, the alien defendant must be afforded the opportunity to apply for any relief from deportation for which he or she may be eligible under the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101-1557 (1994). The Petitioner did not receive these basic protections.

The summary deportation order and consequent due process violations encountered by the Petitioner were not unique. Indeed, the sentencing practices by federal district judges in the Eleventh Circuit, under the "authority" of section 3583(d), have led to the imminent deportation of other defendants based solely on district court deportation orders, and many other defendants inevitably will be affected as well. Many defendants first learn of the possibility of deportation at their sentencing hearings and are given no meaningful opportunity to contest their deportability status or present evidence as to why they should not be deported. These summary deportation orders are entered without regard to the defendant's status under the immigration laws and without any consideration as to whether the defendant is a lawful permanent resident of the United States, whether the

defendant's immediate family members (including spouses, parents and children) may be United States citizens, the length of time the defendant has been in the United States or whether the defendant is eligible for relief from deportation such as political asylum or withholding of deportation. *See, e.g.*, 8 U.S.C. §§ 1158(a), 1253(h). As a result, these deportation orders do not provide due process of law and improperly deprive defendants of other rights and benefits for which they may be eligible under the INA.

The initial inquiry for the Court is whether 18 U.S.C. § 3583(d) authorizes federal district court judges to order defendants deported at the time of criminal sentencing. The Petitioner and the Solicitor General assert that, under a traditional statutory construction analysis, section 3583(d) merely authorizes the district courts, under certain circumstances, to require alien defendants to be delivered to the Attorney General for deportation proceedings. The ABA supports this statutory construction analysis, which we understand will be presented to the Court by the Petitioner and the Solicitor General, and the ABA does not repeat their legal analyses in this *amicus curiae* brief.

However, even if section 3583(d) is interpreted to authorize federal district judges to determine a defendant's alienage and deportability, and to order his or her deportation as a condition of supervised release, the ABA believes that the sentencing court must – consistent with due process and procedural safeguards – provide adequate notice of the court's intent to impose such a sentence, ensure that the defendant's deportability is proven

by the requisite clear, unequivocal and convincing standard, allow the defendant a reasonable opportunity to contest the deportability charge, and enable the defendant to seek any relief from deportation for which he may be eligible. Neither the Petitioner nor many other defendants sentenced within the Eleventh Circuit under section 3583(d) were afforded these basic protections. Whether or not Congress intended to create co-extensive jurisdiction in the Executive and Judicial Branches to adjudicate deportability in the first instance, no interpretation of section 3583(d) should result in the denial to any person facing possible deportation of his constitutional rights or protections in adjudication otherwise available under the immigration laws.

ARGUMENT

1. This action raises the fundamental question of whether due process and other protections traditionally afforded persons facing possible deportation may be bypassed when the question of the person's deportability first arises in the context of a federal district court sentencing hearing. The statute at issue, 18 U.S.C. § 3583(d), authorizes a federal district court, at the time of an "alien defendant's" sentencing, to provide for the defendant's deportation as a condition of supervised release. While the Petitioner and the Solicitor General assert – and the First, Second, Fourth, Fifth, Ninth and Tenth Circuits have concluded – that section 3583(d) only authorizes the district judge to refer an alien defendant to the Attorney General for deportation proceedings in accordance with the INA, the Eleventh Circuit Court of Appeals has been

construing the statute as authorizing the district courts to order defendants deported, thereby depriving these persons of their due process rights with respect to the deportation component of their criminal law proceedings.[2]

The ABA supports the view that 18 U.S.C. § 3583(d) does not authorize federal district courts to order the deportation of alien defendants. Instead, the statute permits the court to facilitate and expedite deportation proceedings by the Attorney General, in accordance with immigration laws and due process, as a sentencing condition. To the extent the legal bases for similar views of the Petitioner and the Solicitor General will be set forth in their briefings as parties, the ABA, as *amicus curiae*, does not recite the legal authorities here.

The ABA's further interest arises out of its concern that section 3583(d) should not be interpreted in a manner that deprives defendants of their Fifth Amendment due process and other procedural rights to contest deportability merely because the question of deportability arises as a part of sentencing in federal district court, rather than in administrative proceedings instituted by the Attorney General in accordance with the INA. The ABA's concern is heightened by the fact that defendants within the Eleventh Circuit have been sentenced to

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[2] Being foreign born, alone, does not mean that a person is an "alien." Further, being an "alien" does not necessarily render a defendant appearing before a district court for sentencing a deportable alien. Nothing in the language of 18 U.S.C. § 3583(d), nor in the INA, authorizes district courts to order an alien deported as a condition of supervised release, without any determination as to whether the defendant is an alien and is deportable under the INA.

deportation as a condition of supervised release, pursuant to 18 U.S.C. § 3583(d), without any due process. Many of these defendants currently are serving sentences of incarceration and will be subject to immediate deportation upon the completion of their prison terms, whether or not their alienage and deportability properly have been established.

Common denominators among these defendants include the lack of adequate notice of deportation, the lack of any meaningful opportunity before the district court to contest deportability, and the lack of opportunity to apply for mandatory or discretionary relief from deportation. Under the sentencing practice at issue in this case, the defendant often receives no advance notice of the possibility of deportation but instead learns of his fate for the first time at the actual sentencing hearing, when the district judge imposes the sentence. The sentencing courts do not routinely make findings regarding alienage and deportability, nor do they adhere to the requirement imposed by this Court that deportability must be established by clear, unequivocal and convincing evidence.

One example of the cursory treatment of deportability by a sentencing judge under section 3583(d) is found in *United States v. Oboh*, 92 F.3d 1082 (11th Cir. 1996) ("*Oboh II*"), the case in which the divided *en banc* court of appeals decided that district judges could order deportations at sentencing. Oboh, one of the defendants in that consolidated appeal, was before the district court for sentencing after pleading guilty to producing false drivers' licenses. The harsh factual circumstances of Oboh learning of his deportation sentence, and his objections to that portion of his sentence, are recounted in the prior

panel decision of the court, *United States v. Oboh*, 65 F.3d 900 (11th Cir. 1995) ("*Oboh I*"), which was later vacated by the *en banc* court, 70 F.3d 87 (11th Cir. 1995), prior to the issuance of *Oboh II*. In the panel decision, Judge Barkett was sharply critical of the procedure employed by the district court:

> It was not until the end of the sentencing hearing, when the district court ordered Oboh to be deported, that he was made aware of any possible deportation. Neither the portion of the probation officer's presentence report which Oboh received nor any governmental action indicated that the subject of his deportability would be taken up at his sentencing. We find that Oboh was not afforded adequate notice or opportunity at his sentencing hearing to respond to the probation officer's recommendation that he be deported. In fact, it appears that Oboh was never even made aware of the basis for the recommendation.

Oboh I, 65 F.3d at 902. In reversing the panel decision and upholding the deportation sentencing order, the *en banc* court did not contest the panel's findings, nor did it make any further inquiries or findings regarding the defendant's alienage or deportability, notwithstanding Oboh's long term presence in the United States and the fact that he had protested to the district court and the court of appeals that he was not in fact deportable. *Oboh II*, 92 F.3d at 1084, 1088.[3]

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[3] The other defendant discussed in *Oboh II*, Bowen, objected to the district court's deportation order under 18 U.S.C. § 3583(d) and claimed that he was improperly precluded from

If the defendants subject to these summary deportation orders at sentencing had been afforded adequate notice of the deportability charges and reasonable opportunities to contest that status, to obtain specialized counsel familiar with immigration laws, to present witnesses in their behalf and to apply for relief from deportation (including withholding of deportation and asylum),[4] the deportation sentences might not have been imposed. Further, had one of these defendants received this type of cursory treatment in administrative deportation proceedings initiated by the Attorney General under the INA, the appellate courts, on a petition for review under the INA, 8 U.S.C. § 1105a, or the district courts, on habeas corpus review pursuant to 8 U.S.C. § 1105a(b), would have remanded the case to the agency to enable the alien to

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applying for asylum in the United States. 92 F.3d at 1084. Bowen did not raise any due process claims on appeal. 92 F.3d at 1087 n.8.

[4] If an alien meets the statutory requirements for withholding of deportation under 8 U.S.C. § 1253(h), the Attorney General is prohibited from deporting the alien. *See Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549, 2553 (1993). If an alien claims eligibility for asylum under 8 U.S.C. § 1158(a), as was the case in *Oboh II*, and the alien meets the criteria for statutory eligibility for asylum as a "refugee," 8 U.S.C. § 1101(a)(42), the statute requires the "Attorney General" to make a determination as to whether the alien should be granted such relief in the exercise of discretion. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 n.5 (1987). There is no indication that the criminal sentencing statute at issue in this case, 18 U.S.C. § 3583(d), was intended by Congress to authorize federal district courts to exercise such discretion.

contest deportability and apply for relief, and chided the Board of Immigration Appeals ("BIA") for failing to afford these basic protections to the alien. *See, e.g., Bigby v. INS*, 21 F.3d 1059, 1064 (11th Cir. 1994) (granting petition for review and remanding the case to the BIA due to failure to properly establish alien's deportability); *Bui v. INS*, 76 F.3d 268 (9th Cir. 1996) (granting petition for review and remanding to BIA because of failure to properly apprise alien of possible eligibility for relief from deportation). The result should be no different where the deportability issue is addressed in the first instance by the district court rather than in administrative proceedings.

Accordingly, if this Court nevertheless upholds the Eleventh Circuit's interpretation of 18 U.S.C. § 3583(d) as authorizing federal district courts to make deportability determinations as part of criminal sentencing, the ABA respectfully submits that the "deportation" portion of Petitioner's sentence must be vacated and the case remanded to enable the Petitioner to challenge deportability and apply for whatever relief from deportation he may be eligible for in accordance with his due process rights.

2. This Court consistently has recognized that the consequences of deportation may be severe. *See Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (Brandeis, J.) (deportation may "result . . . in loss of both property and life; or of all that makes life worth living."); *INS v. Cardoza-Fonseca*, 480 U.S. at 449 ("Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country."); *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947) ("Deportation can be the equivalent of banishment

or exile."); *cf. Woodby v. INS*, 385 U.S. 276, 285 (1966) ("This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification.").[5]

It also is well established that deportation implicates protected liberty interests which may not be taken away without due process of law. *See Yamataya v. Fisher*, 189 U.S. 86, 100-101 (1903) ("No such arbitrary power can exist where the principles involved in due process of law are recognized."); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (aliens entitled to due process and equal protection under the Constitution); *Ng Fung Ho v. White*, 259 U.S. at 284-85 ("[T]he Fifth Amendment affords protection in its guarantee of due process of law."); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) ("Meticulous care must be exercised lest

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[5] *See also Ardestani v. INS*, 502 U.S. at 140 (Blackmun, J., dissenting) ("The alien's stake in the proceeding is enormous (sometimes life or death in the asylum context); the legal rules surrounding deportation and asylum proceedings are very complex; specialized counsel are necessary but in short supply; and evidence suggests that some conduct on the part of the Government in deportation and asylum proceedings has been abusive."). Lower courts have recognized the severity of deportation: *Padilla-Agustin v. INS*, 21 F.3d 970, 978 (9th Cir. 1994) ("When an alien faces the threat of deportation the stakes are high. If he loses, he will be removed from this country – a promised land for many. He may face deprivation, torture or even death when he is returned to his homeland. He may also lose contact with his family and friends."); *United States v. Concepcion*, 795 F. Supp. 1262, 1273 (E.D.N.Y. 1992) ("Perhaps the most severe punishment that can be imposed on these defendants is to banish them from the United States.").

the [deportation] procedure . . . not meet the essential standards of fairness."); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (Due Process clause applies in exclusion hearing); *Rios-Berrios v. INS*, 776 F.2d 859, 862 (9th Cir. 1985).

Fundamental due process principles may not be disregarded because of a person's alienage or his immigration status. *Yamataya v. Fisher*, 189 U.S. at 101 (illegal aliens entitled to due process protections); *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953) ("aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to . . . constitutional protection.").[6]

"An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice

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[6] While due process must be "flexible" to provide protections in varying situations, *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), its application generally involves three considerations: (1) the private interest at stake; (2) the risk of an erroneous deprivation of that interest under the circumstances at issue, and the probable value of additional or substitute safeguards; and (3) the government's interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Plainly, "the private liberty interests involved in deportation proceedings are among the most substantial." *Padilla-Agustin v. INS*, 21 F.3d at 974 (*citing INS v. Cardoza-Fonseca; Bridges v. Wixon, supra*).

and opportunity for hearing.' " *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)); *see also Landon v. Plasencia*, 459 U.S. at 39 (Marshall, J., concurring in part and dissenting in part) ("To satisfy due process, notice must . . . be provided sufficiently in advance of the hearing to 'give the charged party a chance to marshal the facts in his defense' "). Due process also requires that the opportunity to be heard be afforded "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Where fundamental principles of due process have not been afforded to aliens facing possible deportation, the courts have struck down such practices. *See Bridges v. Wixon*, 326 U.S. at 156 (deportation order entered in violation of due process because of denial of fair hearing); *Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *Castillo-Villagra v. INS*, 972 F.2d 1017, 1029 (9th Cir. 1992) ("To deny an opportunity to be heard . . . was a denial of Due Process required by the Fifth Amendment. . . . [D]eportation proceedings must conform to requirements of the Fifth Amendment Due Process Clause and . . . these requirements are established by a 'full and fair hearing.' "); *Chike v. INS*, 948 F.2d 961, 962 (5th Cir. 1991) (denial of opportunity to be heard " 'impinged upon the fundamental fairness of the hearing in violation of the fifth amendment.' ") (*quoting Ramirez-Durazo v. INS*, 794 F.2d 491, 500 (9th Cir. 1986)); *Castillo-Manzanarez v. INS*, 65 F.3d 793, 796 (9th Cir. 1995) (failure to receive constitutionally adequate notice of summary dismissal possibility); *Padilla-Agustin v. INS*, 21 F.3d at 978 (inadequate notice of deportation appeal procedures: "due process requires that

aliens who seek to appeal be given a fair opportunity to present their cases."); *Gonzalez-Julio v. INS*, 34 F.3d 820 (9th Cir. 1994) (denial of due process where alien not afforded meaningful opportunity to pursue appeal of deportation order).

In addition to these fundamental due process principles applicable to persons facing possible deportation, this Court also has attached a heavy burden of proof to all allegations of deportability: "We hold that no deportation order may be entered unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true." *Woodby v. INS*, 385 U.S. at 286; *see also Gameros-Hernandez v. INS*, 883 F.2d 839, 841 (9th Cir. 1989) (reversing deportation order for lack of "solidity of proof" mandated by the Supreme Court under *Woodby v. INS*).

Under the established due process and burden of proof standards above, the deportation order issued by the district court in this case, and deportation orders issued within the Eleventh Circuit under 18 U.S.C. § 3583(d) in similar circumstances, do not withstand scrutiny. The Petitioner and other defendants have been ordered deported without adequate notice, without any opportunity to contest alienage and deportability and without any meaningful opportunity to be heard in respect of their deportability, all in plain violation of their due process rights. Moreover, there is no indication that the defendants being sentenced to deportation under this statute are deportable by "clear, unequivocal and convincing evidence," as required. Accordingly, this deportation "condition" of Petitioner's sentence is improper and must be vacated.

3. The INA sets forth the criteria for determining whether a non-United States citizen or alien (a) is subject to deportation or removal from the United States, and (b) if so, whether or not the alien is eligible for relief from deportation. Pursuant to the INA, the Immigration and Naturalization Service ("INS") has promulgated regulations setting forth the specific procedures for adjudicating deportability, determining eligibility for relief from deportation and the grant of such relief. *See, e.g.*, 8 C.F.R. § 242 (1996).

Congress traditionally has provided aliens, through the INA, with protections consistent with their constitutional rights in deportation proceedings. For example, the Attorney General is required, *inter alia*, to ensure that: (a) the alien is provided reasonable notice of the charges against him and the opportunity to inspect or present evidence to rebut those charges, (b) the alien has the privilege of being represented, at the alien's own expense, by counsel of the alien's choosing who is authorized to practice in immigration proceedings,[7] (c) the alien is afforded a reasonable opportunity to inspect the

[7] Courts have held that aliens in deportation proceedings have a Fifth Amendment due process right to access to counsel. *See Montilla v. INS*, 926 F.2d 162, 166 (2d Cir. 1991) ("the Due Process clause . . . affords an alien the right to counsel of his own choice at his own expense"); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 554 (9th Cir. 1990) ("aliens have a due process right to obtain counsel of their choice at their own expense"). *See, e.g.*, 8 U.S.C. § 1362 (providing "right to counsel"); *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988) (the legislative history of section 1362 of the INA makes clear that Congress "wanted to confer a *right*" to counsel upon aliens in deportation proceedings).

evidence against him and to rebut the charges of deportability,[8] and (d) a record of proceedings is maintained for possible judicial review. *See, e.g.*, 8 U.S.C. § 1252(b).[9] Congress also provided for federal court review of final orders of deportation. 8 U.S.C. § 1105a.

Courts have construed various INA deportation provisions as being consistent with due process. For example, courts have determined that 8 U.S.C. § 1252(b)

> ensures the alien a full measure of due process by first requiring a special inquiry officer to "conduct proceedings *under this section* to determine the deportability of any alien," then by prescribing a procedure full of due process safeguards, and finally by making "[t]he procedure so prescribed the sole and exclusive procedure for determining the deportability of an alien under this section."

United States v. Hernandez, 588 F.2d 346, 351 (2d Cir. 1978) (emphasis in original); *see also Rios-Berrios v. INS*, 776 F.2d at 862 (the INA "directs the Attorney General to adopt

[8] The regulations provide for contested evidentiary hearings, including sworn witness testimony, depositions, third party subpoenas, document discovery, arguments by counsel and agency appeals. *See, e.g.*, 8 C.F.R. §§ 3.3, 3.35.

[9] On September 30, 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996). The IIRAIRA modifies certain deportation procedures under the INA. The new legislation does not, nor does it purport to, affect the sentencing statute at issue in this case, 18 U.S.C. § 3583(d). Whether the new restrictions imposed by Congress in the IIRAIRA are consistent with fundamental due process and other protections afforded to aliens is not an issue in this case.

regulations to assure the integrity of the deportation process (e.g. reasonable notice of charges, reasonable opportunity to present and examine evidence, sufficiency of evidence to support deportability, etc.)").

4. The statute at issue in this case does not specifically reference any due process safeguards, nor does it reference any statutory safeguards provided in the INA for the conduct of deportation proceedings. Rather, Congress merely provides that, when an alien is "subject to deportation," the sentencing court may "provide," as a condition of supervised release, that the defendant be deported. 18 U.S.C. § 3583(d). The courts of appeals which have construed section 3583(d) as only allowing district courts to provide for deportation, rather than adjudicating deportability in the first instance and ordering deportations without further proceedings, agree that certain due process safeguards afforded aliens remain applicable in the context of section 3583(d). For example, in *United States v. Ramirez*, 948 F.2d 66, 68 (1st Cir. 1991) (Breyer, J.), the court of appeals held that a section 3583(d) sentencing order must provide for a "proper" deportation hearing "in accordance with the established procedures provided by the Immigration and Naturalization Act." Previously, in *United States v. Sanchez*, 923 F.2d 236 (1st Cir. 1991), the First Circuit held: "In other words, following [the alien's] surrender to Immigration authorities [pursuant to a section 3583(d) sentencing order], he is entitled to whatever process and procedures are prescribed by and under the Immigration and Naturalization Act for one in [the alien's] circumstances, for the purpose of determining whether he is 'an alien defendant . . . subject to deportation.' " 923 F.2d at 237. *See also United*

States v. Xiang, 77 F.3d 771, 773 (4th Cir. 1996) (requiring that section 3583(d) sentencing order provide for deportation "in accordance with established procedures provided by the Immigration and Naturalization Act."); *United States v. Phommachanh*, 91 F.3d 1383 (10th Cir. 1996) (same); *United States v. Quaye*, 57 F.3d 447, 450 (5th Cir. 1995) (refusing to construe section 3583(d) in a manner that would "deprive aliens deported at sentencing of such relief as alien asylum, which the Attorney General may grant."); *United States v. Kassar*, 47 F.3d 562, 568 (2d Cir. 1995) (district judge lacks authority under section 3583(d) to "order" INS to deport alien defendant).[10]

The Eleventh Circuit, however, has only made passing reference to due process considerations in this context. In *United States v. Chukwura*, 5 F.3d 1420, 1424 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 102 (1994), for example, while not expressly requiring the district judge to conduct an "INS type [deportation] hearing," the panel nevertheless found that the district court had conducted a hearing which "met those requirements." Subsequently, however, in *Oboh II*, 92 F.3d at 1087, the court conceded that while aliens facing deportation under a section 3583(d) sentencing order are afforded certain "procedural safeguards," such safeguards do not "afford defendants recourse from deportation equal to that available under the Immigration and Nationality Act."

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[10] While these courts were careful to ensure that deportation is not ordered absent certain procedural safeguards provided in administrative proceedings, they did not undertake a constitutional analysis to determine whether the deportation procedures accorded under the INA satisfy Fifth Amendment due process requirements.

Moreover, the practice approved by the Eleventh Circuit deprives the defendant sentenced to deportation under 18 U.S.C. § 3583(d) of basic due process protections: The defendant need not be given reasonable advance notice of the charges against him, a meaningful opportunity to rebut those charges or an opportunity to apply for relief from deportation. Whatever "due process" the Eleventh Circuit found present under these circumstances, *see United States v. Chukwura, supra,* (which the court did not delineate), the process given was wholly inadequate in terms of constitutional due process.[11]

Given the potentially grave consequences of an erroneous order of deportation, fundamental constitutional

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[11] In 1994, following the 1993 sentencing order at issue in Petitioner's case, Congress enacted a new provision of the INA allowing for "judicial deportation" of aliens under certain circumstances, at the time of a defendant-alien's sentencing in federal district court. *See* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 224, 108 Stat. 4305 (1994) (codified at 8 U.S.C. § 1252a(d)). Congress mandated specific procedures which must be complied with in order to effectuate such a deportation including: the requirement that the INS Commissioner concur with a United States Attorney's request for judicial deportation, advance (pre-trial) notice to the alien-defendant of such a request, advance notice to the alien of the factual basis for deportability, and a reasonable opportunity for the alien to examine the evidence against him, to present witnesses in his behalf and to cross-examine any government witnesses. 8 U.S.C. § 1252a(d)(2). Congress amended this statute again in the recent IIRAIRA. Since neither the Petitioner nor other defendants sentenced under 18 U.S.C. § 3583(d) were sentenced under this judicial deportation provision, the question of whether that statute affords adequate constitutional due process protections is beyond the scope of this case and the ABA does not address that issue here.

principles preclude the entry of such an order without due process of law. The most basic principles of due process – adequate notice, fair treatment, the opportunity to be heard in a meaningful manner – were not provided to the Petitioner in this case. As a consequence, the deportation sentence imposed under 18 U.S.C. § 3583(d) cannot be upheld.

CONCLUSION

For all of the foregoing reasons, *amicus* American Bar Association requests the Court to reverse the decision of the Eleventh Circuit and direct that the order of deportation be vacated on the ground that it was entered in violation of Petitioner's due process rights.

Respectfully submitted,

N. Lee Cooper, Esq.
President
American Bar Association
750 North Lake Shore Drive
Chicago, Illinois 60611

312/988-5000

Counsel:

Robert E. Juceam, Esq.
Douglas W. Baruch, Esq.

Carol L. Wolchok, Esq.